

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-006285

11/07/2012

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT
M. Brady
Deputy

GOLDMAN GROUP I X, L L C

DAVID C TIERNEY

v.

CITY OF PHOENIX, et al.

MARIO BRENNAN RAY

WILLIAM A MILLER

UNDER ADVISEMENT RULING

The Court has under advisement Bethany Core's Motion for Summary Judgment on Declaratory Judgment/Injunctive Relief and Breach of Contract Claims, the Opposition by Plaintiff and Bethany Core's Reply, together with the respective Statements of Facts.

The Court also has under advisement Defendant City of Phoenix and Debra Stark's Motion for Summary Judgment, Plaintiff's Opposition to City/Stark Motion for Summary Judgment, Defendant City of Phoenix and Debra Stark's Response in Support of their Motion for Summary Judgment, together with the respective Statements of Facts.

The Court has also considered Plaintiff's Post Oral Argument Memorandum on Summary Judgments and Defendant City of Phoenix and Debra Stark's Response to Plaintiff's Post Oral Argument Memorandum on Summary Judgments.

The Court also has before it Defendant City of Phoenix and Debra Stark's Reply in Support of Legal Memorandum Re: William Allison Immunity and 30(b)(6) Depositions, Plaintiff's Opposition to City of Phoenix and Debra Stark's Request to Prevent Depositions, Defendant City of Phoenix and Debra Stark's Reply in Support of Legal Memorandum Re: William Allison Immunity and 30(b)(6) Depositions, Non-party, William Allison's Legal

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Memorandum Re: Deposition of William Allison and Plaintiff's Opposition to Allison's
Memorandum Re: Deposition.

The Court also has before it Bethany Core's Motion to Strike under Rule 12(f) and
Plaintiff's Opposition to Bethany's October 19, 2012 Motion to Strike Material from Pleadings.

On its Motion for Summary Judgment,

Bethany Core raises one argument in its papers and a new argument at oral argument. The gist of the argument raised in the papers is that the Court's minute entry on the Temporary Restraining Order is the law of the case, and that Bethany Core has abandoned its intentions to re-stripe the no-build zone. The new argument at oral argument is that the allegations in the most recent amended complaint are not sufficient to support a breach of contract claim.

The law of the case argument fails because a temporary restraining order/preliminary injunction hearing is not a trial on the merits or dispositive motion, and the findings are not dispositive. They are only findings based on the facts elicited at that hearing. New evidence may be presented at a trial on the merits or by dispositive motion

The new argument made at oral argument is interesting, but not ripe. It is also troubling because Bethany Core is trying to change the facts while the litigation is pending by changing their intentions mid-stream. Without addressing the merits, the Court chooses not to entertain speculative changes of intentions.

Bethany Core also argues that the facts have changed because a measurement of the center shows that the square footage is less than previously thought and the parking requirements are less. However, no evidence concerning that is properly before the Court.

Therefore,

IT IS ORDERED denying Bethany Core's Motion for Summary Judgment without prejudice to re-urge the issues if they become ripe for decision.

The City of Phoenix Motion for Summary Judgment argues that the Court may not substitute its judgment for the City's, and that the Court may focus on the process, but not the outcome. The City also argues that it may rely on the representations in plans under an architect's seal. At oral argument, the City argued that Plaintiff has failed to exhaust its administrative remedies. That argument was made tangentially in the papers by the case law cited by the City.

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Plaintiff argues in its supplemental briefing that certain of the decisions in question are not Zoning Hearing Officer decisions or Zoning Administrator decisions that require appeal to the Board of Adjustment, under either A.R.S 9-462.06(C) or (F). Specifically, Plaintiff argues that the decision by Zoning Administrator that the prior variance is now vested is not a decision that is appealable. The Plaintiff also argues that approval of the various parking plans is not an appealable decision, but that both are staff decisions subject to the jurisdiction of this Court.

The City argues that the vesting decision is an official decision of the Zoning Administrator that is subject to appeal, and that the plans are derivative of the Zoning Hearing Officer's decision, and are subject to appeal.

The Court finds that the exhaustion of remedies argument is well-taken. Specifically, the Court finds that there is no settled record for its review from the City's decisions.

IT IS ORDERED denying the Motion for Summary Judgment without prejudice to raise the same issues later.

IT IS ORDERED staying this proceeding pending appeal, or appeals, to the Board of Adjustment.

IT IS FURTHER ORDERED that the time for appeal to the Board of Adjustment has been tolled during the proceedings in this Court, as the extraordinary remedies of injunctive relief were undertaken in good faith by Plaintiff, even though ultimately denied.

IT IS FURTHER ORDERED allowing Plaintiff to take depositions under Rule 30(a) of the following persons:

Debra Stark, in her official capacity with the City of Phoenix
Alan Stephenson, in his official capacity with City of Phoenix
Derek Fancon, in his official capacity with the City of Phoenix
Richard Butler, AIA
Shane Silsby
Rick Cole

IT IS FURTHER ORDERED that William Allison's deposition may not be taken because his position as Zoning Hearing Officer is quasi-judicial and entitled to immunity.

IT IS FURTHER ORDERED granting Defendant Bethany Core's Motion to Strike under Rule 12(f).

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IT IS ORDERED striking all gratuitous references such as “fat cat”, “greedy developer”, “cooking the books”, and other name-calling.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.